Supreme Court, U. S.
FILED
MAR 19 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 79-1534

AUGUST BUTLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S BRIEF
AUGUST BUTLER

CHARLES L. FRANZ, JR.
1019 Camden Street
San Antonio, Texas 78215
Attorney for Petitioner

February 27, 1980

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
REQUEST FOR ORAL ARGUMENT	3
STATUTES INVOLVED	3
QUESTIONS PRESENTED	5
STATEMENT OF THE CASE	6
REASONS FOR GRANTING WRIT	9
FIRST QUESTION PRESENTED	10
SECOND QUESTION PRESENTED	14
SUBSTANTIALITY OF FEDERAL QUESTION	17
THIRD QUESTION PRESENTED	17
FOURTH QUESTION PRESENTED	18
ARGUMENT AND AUTHORITIES	19
FIFTH QUESTION PRESENTED	20
ARGUMENT AND AUTHORITIES	20
SIXTH QUESTION PRESENTED	21
ARGUMENT AND AUTHORITIES	21
SEVENTH QUESTION PRESENTED	22
ARGUMENT AND AUTHORITIES	22
EIGHTH QUESTION PRESENTED	22
ARGUMENT AND AUTHORITIES	22
SUBSTANTIALITY OF FEDERAL QUESTION	23
NINTH QUESTION PRESENTED	24
ARGUMENT AND AUTHORITIES	24
TENTH QUESTION PRESENTED	28
ARGUMENT AND AUTHORITIES	28

CONCLUSION 29
PRAYER 30
CERTIFICATE OF SERVICE 30
ANNEX A—Indictment 31
ANNEX B—Judgment of District Court 32
ANNEX C—Judgment of Court of Appeals 33
ANNEX D—Judgment on Rehearing 34

TABLE OF AUTHORITIES

Page

Cases:

Allen v. Estelle,
568 F.2d 1108 (1978) 16
Batro v. State,
531 S.W.2d 613 (1975).....21
Blevins v. State,
176 S.W.2d 173 (1943).....20
Bouie v. State,
528 S.W.2d 587 (1975).....21
Bradley v. State,
560 S.W.2d 650 (1978).....22, 26
Davis v. State,
557 S.W.2d 303 (1977).....27
Dowden v. State,
537 S.W.2d (1976) 26
Ex Parte Bain,
121 U.S. 1 (1887).....12, 13
Ex Parte Fuqua,
548 S.W.2d 909 (1977).....20
Ex Parte Haywood,
550 S.W.2d 173 (1977).....20

Gables v. State,
68 S.W. 288 (1901) 23

Gaither v. United States,
413 F.2d 1061 (1969) 11

Goodson v. State,
531 S.W.2d 140 (1976) 19, 23

Hilson v. State,
276 S.W. 272 (1925) 23

Jackson v. State,
551 S.W.2d 351 (1977) 28

Jones v. State,
535 S.W.2d 184 (1976) 21

Kimbrough v. Cox,
444 F.2d 8 (1971) 16

Lucero v. State,
502 S.W.2d 128 (1973) 21

Manson v. Braithwaite,
97 S.Ct. 2243 (1977) 17

Page v. State,
532 S.W.2d 341 21

Robinson v. State,
553 S.W.2d 371 (1977) 28

Saltys v. Adams,
465 F.2d 1023 (1972) 14

Simmons v. United States,
390 U.S. 377, 88 S.Ct. 967 (1968) 15

Stovall v. Denno,
388 U.S. 293, 87 S.Ct. (1967) 17

United States v. Busch,
505 F.2d 78 (1974) 27

United States v. Doedocie,
603 F.2d 535 14

United States v. Florio,
315 F.Supp. 795, 1970 D.C.N.Y. 13

United States v. Green,
494 F.2d 820 (1974) 27

United States v. Mullens,
583 F.2d 134 21

United States v. Southerland,
428 F.2d 1152 (1970) 16

United States v. Tibbs,
600 F.2d 19 13

Weaver v. State,
551 S.W.2d 419 (1977).....19

Williams v. State,
547 S.W.2d 18 (1976).....26

Statutes:

18 U.S.C. Section 3.....3

18 U.S.C. Section 13 3

Section 29.03 Texas Penal Code 4

Federal Rule 6 (F).....11

IN THE

Supreme Court of the United States

No.

AUGUST BUTLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S BRIEF
AUGUST BUTLER

PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes August Butler, the Petitioner herein, and prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

On August 8, 1978, A Federal Grand Jury in the Southern District indicted Petitioner-Appellant, August Butler, a black citizen of Bexar County, Texas, for violation of Title 18, United States Code, Section 3, and Section 29.03 of the Texas Penal Code. (R-1). August Butler pleaded not guilty and at the conclusion of a Trial December 8, 1978, was convicted by a jury in the United States District Court for the Southern District of Texas, Honorable Owen D. Cox, District Judge Presiding. (R-14). August Butler filed a Motion for a New Trial on December 15, 1978, (R-30-31), which was denied on December 19, 1978. (R-32). August Butler gave his Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on January 5, 1979 (R-34). Honorable Owen D. Cox extended the period for filing the record in the Court of Appeals to April 19, 1979. The Brief for Appellant was filed June 3, 1979. The Brief for Appellee was filed July 3, 1979. On December 14, 1979, the United States Court of Appeals for the Fifth Circuit Affirmed the Judgment of the Trial Court. On January 30, 1980, the Appellant's Motion for a Re-hearing was denied.

JURISDICTION

The Judgment of the United States District Court for the Southern District of Texas was entered on January 9, 1979. The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 14, 1979. A timely Petition for Re-hearing was denied January 30,

1980. The jurisdiction of this Court is invoked under U.S.C. 3 and 18 U.S.C. 13 and Sec. 29.03 of the Texas Penal Code and 28 U.S.C. 1254(2).

REQUEST FOR ORAL ARGUMENT

Petitioner respectfully requests this Honorable Supreme Court to set this Petition for a Writ of Certiorari for Oral Argument. Questions and answers regarding particular events in the transcript and record would benefit the Court.

Statues Involved

18 U.S.C. 3 *Accessory after the fact.*

Whoever, knowing that an offense against the United States has been committed, receives, relieves, conforts or assists the offender to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum fine prescribed for the punishment of the accessory shall be imprisoned not more than ten years.

18 U.S.C. 13 *Laws of states adopted for areas within federal jurisdiction.*

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be

punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Section 29.03 *Texas Penal Code—Aggravated Robbery.*

(a) A person commits an offense if he commits robbery as defined in Section 29.02 of this code, and he:

(1) causes serious bodily injury to another; or

(2) uses or exhibits a deadly weapon.

(b) An offense under this section is a felony of the first degree.

Section 29.02 *Texas Penal Code—Robbery.*

(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 of this code and with intent to obtain or maintain control of the property, he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

(b) An offense under this section is a felony of the second degree.

Questions Presented

1. Whether or not a District Judge can alter an indictment?
2. Whether or not the identification witnesses were reliable?
3. Whether or not the government proved jurisdiction?
4. Whether or not the government proved beyond a reasonable doubt that a pistol was used in the alleged robbery?
5. Whether or not the indictment must allege ownership?
6. Whether or not the indictment must allege that the money was "United States Currency"?
7. Whether or not the indictment must allege that the taking was without the owner's consent?
8. Whether or not the trial court should have charged the jury on circumstantial evidence?
9. Whether or not the charge given to the jury was improper?
10. Whether or not the F.B.I. fingerprint report that was favorable to the defendant was properly excluded from evidence?

Statement of the Case

Lorraine Annamae Boyd testified (T-9) that on August 5, 1978, she closed the store at 7:00 P.M., and that at the time two (2) black men in their mid-twenties were in the store. (T-10). One of the men picked up a six pack of Schlitz beer in cans and the other picked up a bottle of Christian Brothers Brandy (T-11). She asked for an I.D. Card so she could serve them. (T-11). Then one of them turned to the other one and said, "Did you bring your I.D." and he said, "No, I left it on my bed." "I thold them that I would not be able to serve them." "I walked to the door to let them out and reached for my key, that was when I was grabbed by the arm and shoved into the office." "He told me not to make a sound." (T-12) She did not see a pistol. She said she could just see the end of the barrel and couldn't know if it was a shotgun or a derringer. (T-12) She didn't see anyone take the money from the safe, and she didn't feel threatened. She did not see either of them get into the safe (T-15). When asked by the prosecutor, "Were you able to see whether or not they got into the safe, yourself, could you see anything like that?" She answered, "One of them is bound to have grabbed the money off the top shelf of the safe." This answer is unresponsive and assumes a fact that is not in evidence and further tells the jury that she in fact did not see anything like that. After the men left she was able to et loose enough to get to her desk (T-17). She said Shawn Alan Witcomb came in two (2) minutes after the two black men left. (T-18). She said Chief Rodley came in and cut the rope with his penknife. (T-17). She said $900.00 was taken. (T-18) She said that one of the black men was wearing a black background shirt that had different colored flowers on it, a very subdued color, as far as that goes, vice nice, (T-19), and was clean shaven, and neatly dressed the same way as

August Butler. (T-19) She knows that she could have seen August Butler before, (T-20) but she has no recollection of seeing the robber before. (T-21) Prior to the trial she identified an uncharged suspect as performing the role in the robbery that she later described at the trial as that performed by August Butler. She said the other robber was clean shaven also, had an afro, a light blue shirt, a V-neck type shirt and dark blue pants. (T-22) She said it was the other black man that has the gun. (T-22) She said she would recognize the eyes of the man that had the gun and it was not August Butler. (T-27) She said that on the scale of one to ten she would place August Butler at five because she did not get to look at him as long as she did the other person. (T-23)

Ruben Cuevas said he works for Civil Service, security guard at NAS, Corpus Christi. (T-36) He said that while there on August 5, 1978, a burglar alarm went off (T-11), and said he heard over the radio that a blue car was wanted with two black men in it. He said he saw the driver and that the driver had a blue cap on and wore a light blue shirt, and that the passenger had a flowered shirt. He said he got the license plate. (T-38). He identified a photograph shown him by Ruben V. Martinez as the driver of the vehicle, which was No. 1. (T-42) He said that on a scale of one to ten he would place his ability to identify August Butler at about seven and one-half. (T-47)

E. C. Miller testified that he saw either a blue or a black or a real dark blue Buick, but couldn't swear to it. (T-52) He said that about 4:00 in the afternoon he saw a car drive in front of his mobile home and make a circle in McDaniel's driveway, and stop, and then two men got out, went away, came back and went away again. He said they both seemed to be slim. (T-54) E. C. Miller testified that he lived at "1005 Flour Bluff Drive" and the prosecutor asked the

leading question, "That is near the Navy Aid Station, isn't it?" and the witness answered, "yes sir." Near the Navy Air Station is not on the base.

Donnie Lee McDaniel said he saw a Black automobile parked in his driveway. He said it was navy blue or dark navy blue. (T-56) He said he called the police and a wrecker hauled it away. (T-51) He said this happened between 6:00 and 7:00 P.M. (T-61)

Hans P. Hansen testified that he went to the police pound lot on Sunday, August 13, 1978 and saw a Buick Riviera, a dark blue in color, but did not observe the decal. (T-67) He said he talked to August Butler August 13, 1978 and obtained his permission before searching the trunk of the car. (T-71)

Ruben V. Martinez, who was excused by the Court from the Rule, testified that on Sunday, August 6, 1978, he obtained a search warrant and found $165.00 stuffed underneath the driver's side of the front seat. (T-74) The alledged search warrant was not introduced into evidence. He said that in the glove compartment he found a wallet, a check book, a payroll check, a military dependent's I.D. Card, and a driver's license. On cross examination he said the search was on Tuesday, August 8, 1978. (T-75) He said that the driver's license picture was marked No. 7 and that the photo lineup was about ten (10) days after the robbery. (T-56) He said he only used six (6) photographs in the lineup. (T-77) Later he changed his testimony and said that he went to the police station August 13, 1978. On page 77 of the transcript he testified that Ruben Cuevas picked out photograph No. 1, which is definitely not August Butler as being one of the men he saw the night of the robbery, but another man.

Ernest D. Wilson testified that he checked some finger-

prints with those of August Butler and they did not match. (T-112)

Floyd Bieniek testified that the care was impounded on August 6, 1978 and released to August Butler on August 13, 1978. (T-146). He said that a stolen auto report is not taken on the telephone. (T-150).

Petitioner has attempted to show this Honorable Supreme Court that August Butler is innocent and did not get a fair trial. August Butler was never clean shaven in the last five years. He was in Corpus Christi on August 5, 1978 and his car was stolen. He was wearing a shirt that had the words Port Isabel on the front of it. His personal things were found in the glove box, a natural and usual place for a man like August Butler because he works for an elevator company and had a habit of not carrying anything that might be lost in an elevator shaft. If this Court does not reverse this case an innocent man will be inarcerated for a crime he never committed.

Reasons for Granting Writ

Petitioner respectfully submits that with respect to due process and fundamental fairness, the Defendant August Butlerdid not receive a "fair trial" because:

1. It was improper for the District Judge to alter the indictment. That is, he changed the Violation from Title 18 United States Code, Section 3 to Title 18, United States Code, Section 13.

2. The identification witnesses were unreliable. There was a total lack of identification. There was no positive identification of August Butler by the victim.

3. The government improperly failed to prove jurisdic-

tion. There was no evidence of where the Naval Air Station is located. There was no evidence that a crime was committed within the jurisdiction of the Southern District of Texas.

4. The government improperly failed to prove beyond a reasonable doubt that a pistol was used in the alleged robbery. No pistol was introduced into evidence. No one even saw a pistol. The record is silent as to a pistol.

5. The indictment did not allege ownership.

6. The indictment did not allege that the money was "United States Currency".

7. The indictment did not allege that the taking was without the owner's consent.

8. The trial court shoudl have charged the jury on circumstantial evidence. The Defendant's special requested charge was denied.

9. The charge given to the jury was improper.

10. The F.B.I. fingerprint report that was favorable to the defendant was improperly excluded from evidence.

Petitioner therefore respectfully prays that this Honorable Court will grant this petition for a writ of certiorari and review this case and reverse and remand this cause for further proceedings or dismiss the indictment and discharge the petitioner.

First Question Presented: Whether or not it is improper for a District Judge to alter an indictment?

August Butler, by and through his attorney in the trial court, Hon. J. Bonner Dorsey, made a Motion for a Judgment of Acquittal after the government rested. (T-170). In the Motion for a Judgment of Acquittal, he pointed out that the indictment in this case (Appendix A) was for a violation of 18 U.S.C. 3. (R-1). Likewise, the original

Court's charge (R-21) said Title 18 United States Code, Section 3. (T-171). The trial court erred in allowing the government to correct the instant indictment per Court Order on December 8, 1978. This was after the Defendant was placed in jeopardy and after the government rested and closed it's case. (T-174). The government rested and closed on Page 169 of the Transcript.

An amendment to the indictment is to be distinguished from a variance between the indictment and the proof adduced.

An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or Court after the Grand Jury has last passed upon them. A variance occurs when the charging terms of the indictment are left unaltered by the evidence offered at trial proves facts materially different from those alleged in the indictment. *Gaither v. United States*, 413 F.2d 1061, 134 U.S. App.D.C. 1071 (1969).

Rule 6 (f) of the Federal Rules of Criminal Procedures provides: "An indictment may be found only upon the concurrence of twelve or more jurors." This is further specified by the Fifth Amendment's command that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

This issue was first raised in the case at bar on September 19, 1978, when Defendant's Motion to Dismiss the Indictment (T-6) was filed.

The indictment as a charging instrument has been recog-

---

[1]Record on appeal, hereinafter referred to as (R-).

[2]Transcript, hereinafter referred to as (T-).

nized to have two chief purposes:

first, to appraise the accused of the charges against him, so that he may adequately prepare his defense, and

second, to describe the crime with which he is charged with sufficient specifically to enable him to protest against future jeopardy for the same offense.

The Fifth Amendment requires that an indictment be brought by a Grand Jury. The Grand Jury is interposed "to afford a safeguard against oppressive actions of the prosecutor or a Court."

The very purpose of the requirement that a man be indicted by a Grand Jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.

The sweeping power of the Grand Jury over the terms of the indictment entail very strict limitations upon the power of prosecutor or Court to change the indictment found by the jurors, or to prove at trial facts different from those charged in the indictment.

In the leading case of *Ex Parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887), the Supreme Court said: "If it lies within the province of a Court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the Grand Jury would probably have made it if their attention had been called to the suggested changes, the great importance which the common law attaches to an indictment by a Grand Jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says: "No person shall be held to answer; may e frittered away until its value is almost destroyed." When the indictment is filed with the Court, no change can be made in the body of the instrument by order of the Court, or by the prosecuting attorney, without a resubmission of the case to the Grand Jury.

Ever since *Ex Parte Bain* was decided in 1887, it has been the rule that after an indictment has been returned, its charges may not be broadened through amendment except by the Grand Jury itself. In that case, the court ordered that specific and relevant allegations the grand jury had charged be stricken from the indictment so that Bain might be convicted without proof of those particular allegations. The Supreme Court held that this could not be done.

On September 19, 1978, Defendant's Motion to Dismiss the Indictment was filed (R-6). The motion said that "the alleged facts recited in the indictment do not state an offense under Title 18, United States Code, Section 3, as alleged in the indictment," and "the indictment does not state an offense under the laws of the State of Texas."

In *Ex Parte Bain*, the Supreme Court prohibited amending an indictment by any means other than through the Grand Jury itself.

Even at common law it was beyond question that in the English Courts indictment could not be amended.

The charging part of an indictment can not be changed by a Court to suit its own notions of what it ought to have been or what the grand jury would probably have made it if their attention had been called to the suggested changes. *U.S. v. Florio*, 315 F. Supp. 795, 1970 D.C. N.Y.

A variance between an indictment and evidence is fatal if accused is exposed to danger of double jeopardy. *U.S. v. Tibbs*, 600 F.2d 19.

The indictment must inform defendant of nature and cause of accusation to permit preparation of defense and must equip Defendant with sufficient facts to plead former jeopardy in subsequent prosecution for same offense; indictment which specifically states that all elements of offense also insures that grand jury charged such offense and that

critical parts of charged offense were not subsequently contributed by prosecutor alone. *U.S. v. Diecidue*, 603 F.2d 535.

Second Question Presented: Whether or not the identification witnesses were un-reliable?

There was no positive identification of August Butler by the victim. On a scale of one to ten, she was of a certainty of five. There was no positive identification of August Butler by Ruben Cuevas, a witness.

Lorraine Annamae Boyd said that on a scale of one to ten she placed her ability to identify August Butler at five (T-23). Ruben Cuevas identified a photograph marked #1 as the driver of the getaway car (T-41). This was a photograph of a man named Whitehall (T-77). Ruben Cuevas said that on a scale of one to ten his ability to identify the Defendant was between seven and eight (T-77). Ruben Martinez said that photograph #1 was Whitehall and not August Butler and that #7 was taken from Butler's driver's license and that he used six photographs in the lineup (T-77). Ernest D. Wilson could not match any fingerprints with those of August Butler and said that sweaty or oily hands leave good fingerprints and said he knew Bill Burch (T-96-99). Ruben Martinez could not match any fingerprints (T-110). Ernest D. Wilson could not even match fingerprints after a second try.

Lorraine Annamae Boyd said on Page 19 of the Transcript of the Record that "he was clean shaven," and on page 21 "he did not have the beard or moustache." This could not have been August Butler because he did have a beard and a moustache at that time and has had a beard and moustache for many years.

In *Saltys v. Adams*, 465 F.2d 1023, 1972, Second Circuit, a witness had just picked out petitioner from

photographs as a man "resembling" the robber and a witness went to the bullpen looking specifically for the Defendant, aware that the person suspected by police was there, and the case was reversed with directions.

Ruben Cuevas identified the driver of the car as wearing a blue cap and sort of like light blue shirt and the passenger wearing some kind of a flower shirt (T-40), and his testimony is completely destroyed because he identified photograph No. 1 of Exhibit 1 as being the driver of the car, and August Butler. Lorraine Annamae Boyd testified that the robber was wearing a black background shirt and that photograph No. 7 of Exhibit 1 was August Butler, and that she was 50% certain of this. Ruben V. Martinez was not sure whether he had 6 or 7 pictures in the exhibit (T-77). He said: "I just showed them this group of six photographs."

In *Simmons v. United States*, 88 S.Ct. 967, 390 U.S. 377, 1968, the defendants were convicted of armed robbery and Mr. Justice Harlan delivered the opinion of the Supreme Court that "It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. The danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to

the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or Courtroom identification."

In *Allen v. Estelle*, 568 F.2d 1108, 1978, Fifth Circuit, Chief Justice John R. Brown provided a two tier test for determining whether due process has been violated by police identification procedure. Court must first determine whether procedure was unnecessarily suggestive and then, if it was, they must determine whether procedure created substantial risk of misidentification. The reliability of the identification rests on the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation and the time between the crime and the confrontation. Then against these factors is to be weighed the corrupting effect of the suggestive identification itself in deciding whether due process has been observed.

In *United States v. Southerland*, 428 F.2d 1152, Fifth Cir. 1970, the Court reversed saying "under the facts presented, in Court identifications made of defendant by two employees of robbed bank, preceding in both cases by a photographic identification of picture spread, were so impermissibly suggestive as to have given rise to a very substantial likelihood of irreparable misidentification and should have been excluded.

In *Kimbrough v. Cox*, 444 F.2d 8, 1971, Fourth Cir., a detective went to the home of the money order clerk who had been robbed and exhibited the Kimbrough's pictures, but no

others to her. The only evidence of his guilt was the testimony that three witnesses recognized him as the robber. In view of this, every fact pertaining to identification was important, and it cannot be said that the prosecution's introduction of the impermissible photographic identification to strengthen its case was "harmless beyond reasonable doubt."

In *Manson v. Brathwaite*, 97 S.Ct. 2243, 1977, the Supreme Court reversed a conviction saying "reliability is the linchpin determining the admissibility of identification testimony and the facts to be considered are:

A. The opportunity to view.
B. The decree of attention.
C. The accuracy of the description.
D. The witness' level of certainty.
E. The time between the crime and the confrontation."

Substantiality of Federal Question

A substantial question is presented this Honorable Supreme Court because the Corpus Christi Police have pictures of August Butler that were not introduced at the trial and that prove that he was not clean shaven on August 5, 1978.

The basic purpose of a trial is the determination of truth. *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967. Confrontation for identification is a "critical stage" and counsel is required at all confrontations.

Third Question Presented: Whether or not the government improperly failed to prove jurisdiction?

This case was tried under the Assimilated Crimes Act, which is 18 U.S.C. 13, which provides that the substantive

law of the State be operative in those areas that have exclusive Federal jurisdiction. The record is absolutely silent as to any evidence of jurisdiction of the United States over the land of the Naval Air Station.

Lorraine Annamae Boyd testified that she worked at the package store at the Naval Air Station. (T-20). She did not testify that the Naval Air Station was in the Corpus Christi Division of the Southern District of Texas, on land acquired for the use of the United States and under the exclusive jurisdiction thereof, nor did any other witness. This was a material allegation in the indictment and it was not proved. This point was raised in Defendant's Motion for Judgment of Acquittal. (T-170). Neither was there any evidence of the identity of the Naval Air Station.

At the time of the government's motion to take judicial notice of the fact that the Corpus Christi Naval Station is a Federal enclosure for purposes of 18 United States Code, Sec. 13, the government had already rested. It was error to grant this motion after the government had rested and closed on page 169 of the Transcript of the record.

The Honorable Owen D. Cox erred in granting a Motion of the Government to take judicial notice that the United States Government has jurisdiction over substantive offenses under State Law that are committed on the Naval Air Station. (T-175). This motion was made after the government rested and closed. (T-169). There is no evidence in the record that the Naval Air Station is in Corpus Christi, is in Nueces County or is in the Southern District of Texas.

Fourth Question Presented: Whether or not the government improperly failed to prove beyond a reasonable doubt that a pistol was used in the alleged robbery?

Argument and Authorities

There was absolutely no proof of the type of deadly weapon. The indictment (R-1) charged the Defendant with "using and exhibiting a deadly weapon, namely a pistol." There was no evidence as to the identity of the weapon.

In *Weaver v. State*, 551 S.W.2d 419, 1977, the Texas Court of Criminal Appeals held that variance between indictment and proof that the weapon was a "Luger" automatic pistol was a fatal variance. Where the unnecessary matter is descriptive of that which is legally essential to charge a crime, it must be proven as alleged, even though needlessly stated. It is well established that where a person, place or thing necessary to be mentioned in the indictment is described with unnecessary particularity, all circumstances of description must be proven. Thus, if the pleader makes unnecessary allegations descriptive of the identity of the offense charged, it is incumbent upon the State to establish such allegations by evidence. The description of the deadly weapon was not a necessary allegation, but since it was alleged, it was descriptive of that which was legally essential to charge the offense, to-wit; the deadly weapon, and must be proved as alleged.

In the case at bar, there was no pistol, nor was there any evidence of a pistol as alleged in the indictment (R-1). The testimony of Lorraine Annamae Boyd was that she "couldn't see the whole gun" and "wouldn't know if it was a shortgun or derringer" and was a variance that is material and requires a reversal. Also, there was no proof that Lorraine Annamae Boyd was one and the same person as Lorraine A. Boyd. This also is a material variance and requires a reversal.

In *Goodson v. State*, 531 S.W.2d 140, Tex. Crim. App. 1976, the Court held that the State is bound by its allegations

in the indictment and must prove them beyond a reasonable doubt. Therefore, the State was bound to prove beyond a reasonable doubt that the Appellant robbed the complainant Shaw with a pistol. The proof of robbery with a sawed-off shotgun does not meet the burden.

Fifth Question Presented: Whether or not the indictment must allege ownership?

Argument and Authorities

There was no evidence as to the ownership of the money. This is an essential element.

In the case at bar the indictment does not state an offense against the Laws of the State of Texas because it fails to allege "ownership".

In *Ex Parte Fuqua*, 548 S.W.2d 909, 1977, the Texas Court of Criminal Appeals found that an indictment under which petitioner was convicted of robbery by assault with firearms was fundamentally defective because it failed to allege ownership of property alleged to have been taken.

In *Blevins v. State*, 176 S.W.2d 173, 1943, the Texas Court of Criminals Appeals reversed a conviction for theft because the indictment did not allege "that the alleged stolen property was taken from the possession of the alleged owner, or that it was taken from the possession of any person." In order to find the Appellant guilty thereunder, the jury was not required to believe that the property was taken from the possession of any person.

In *Ex Parte Haywood*, 550 S.W.2d 292, 1977, petitioner was convicted for the offense of robbery by assault. The Texas Court of Criminal Appeals held that the indictment was fatally defective because it failed to allege the party to

whom the property allegedly taken belonged.

An indictment must allege each and every element of a crime charged to pass constitutional muster. *U.S. v. Mullens*, 583 F.2d 134.

Where an indictment which charged robbery by assault and which failed to alledge to whom the property allegedly taken belonged was fundamentally defective and conviction was reversed. *Jones v. State*, 535 S.W.2d 184, 1976.

Also an indictment for robbery by assault was fatally defective where it did not aver to whom property allegedly taken belonged required a reversal. *Batro v. State*, 531 S.W.2d 613, 1975.

A robbery indictment was fatally defective where it failed to recite to whom the property allegedly taken belonged, i.e., it failed to show that the complainant had a possessory interest in the property superior to that of the defendant and required a reversal. *Page v. State*, 532 S.W.2d 341.

An indictment which charged robbery but which failed to allege to whom the property belonged was fundamentally defective and required a reversal. *Bouie v. State*, 528 S.W.2d 587, 1975.

Also an indictment charging robbery by assault, which did not allege other than by inference to whom the property allegedly taken belonged was fatally defective and required a reversal. *Lucero v. State*, 502 S.W.2d 128, 1973.

Sixth Question Presented: Whether or not the indictment must allege that the money was "United States Currency"?

Argument and Authorities

In the case at bar the indictment does not state an offense against the Laws of the State of Texas because there was no

allegation that the "$900.00 in money" was United States Currency.

Seventh Question Presented: Whether or Not the indictment must allege that the taking was without the owner's consent.

Argument and Authorities

In the case at bar the indictment does not state an offense against the Laws of the State of Texas because it did not allege that the property was taken without the owner's consent.

In *Bradley v. State*, 560 S.W.2d 650, 1978, the Texas Court said that "an indictment for theft which does not allege that the taking was without the owner's effective consent is fundamently defective."

Eighth Question Presented: Whether or not the trial court should have charged the jury on circumstantial evidence?

Argument and Authorities

On December 8, 1978, the defendant filed his requested Charge No. 1 (R-13), and on the same day it was denied by the Court.

In his opening statement Hon. Robert Berg, the U.S. Attorney, stated that "a whole lot depends on whether or not Lorraine Annamae Boyd knows what she is talking about." (T-6) He further said, "We have, aside from the direct evidence that she will bring to you, evidence called circumstantial evidence."

There was no direct evidence of August Butler being

identified as a participant in the robbery.

In *Gables v. State*, 68 S.W. 288, Tex. Crim. App., 1901, the Court found that so far as the taking of it was concerned, it depends wholly on circumstantial evidence. A written charge was prepared on circumstantial evidence, and the Court was requested to give it, which was refused. The case was reversed.

In *Goodson v. State*, 531 S.W.2d 140, Tex. Crim. App., 1976, held that circumstantial evidence gave rise to a reasonable inference that robbery was committed with a pistol as charged, and that failure to grant special requested charge on circumstantial evidence was reversible error.

In *Hilson v. State*, 276 S.W. 272, 1925, the Texas Court of Criminal Appeals cited the principle that: "To sustain a conviction, it should appear not only that an offense as charged has been committed, but there should also be proof to a degree of certainty greater than a mere probability or strong suspicion tending to establish that the party charged was the person who committed it or was a participant in its commission. There must be legal and competent evidence pertinently identifying the defendant with the transaction constituting the charge against him."

Petitioner therefore respectfully submits that failure to chare the jury on circumstantial evidence constitutes reversible error.

Substantiality of Federal Question

A substantial question is presented to this Honorable Supreme Court because August Butler has proof that he reported his car stolen to the Corpus Christi Police by a copy of the long distance telephone bill. Also he worked in San Antonio for Esco Elevators on the proceding Friday and his

co-workers saw him at work and know that he was not clean shaven.

Ninth Question Presented: Whether or not the charge given to the jury was improper?

Argument and Authorities

On page 8 (R-23) of the Court's instruction the Honorable Owen D. Cox committed fundamental and reversible error when the indictment (R-1) says: "August Butler did then and there while in the course of committing theft of Nine Hundred Dollars and no cents ($900.00) in money from Lorraine A. Boyd, with intent to obtain and maintain control of the money using and exhibiting a deadly weapon, namely a pistol, knowingly and intentionally threaten and place Lorraine A. Boyd in fear of imminent bodily injury and death," and the instruction says: "August Butler on or about August 5, 1978, at the Naval Air Station in the Corpus Christi Division of the Southern District of Texas, did then and there intentionally or knowingly threaten or place Lorraine A. Boyd in fear of imminent bodily injury or death by using or exhibiting a deadly weapon, to-wit: a pistol while the said August Butler was in the course of committing theft of $900.00 in money from Lorraine A. Boyd, and that said acts, ifany, were committed by the said August Butler with the intent then and there to obtain or maintain control of the aforedescribed property."

Appellant submits that the instruction failed to apply the law to the facts in the case, where the Statute of Robbery Art. 29.02(a)(2), utilizes conjunctively the Statute of Theft Section 31.03(a), and where said section provides that: "A person commits an offense if he unlawfully appropriates

property with intent to deprive the owner of property." Where the Statute of Robbery provisions, when read in conjunction, clearly and adequately constitute the two components and are joined by the conjunction, "and".

Appellant submits that the mere instruction of Article 29.02(1) V.T.C.A., in the abstract of Court's instruction of page 8 (R-23) provided the jury with three (3) different possibilities of finding Appellant guilty of committing theft, rather than applying the single element as avered in the indictment.

The term "in the course of committing theft" means conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt, or commission of theft.

The Court's definition on page 8 of the Court's instructions failed to apply the law to the alleged facts of the case. An indictment must charge acts constituting an offense and in the offense of aggravated robbery, one statutory element is "in the course of committing theft," but where under its statutory definition this element may be proven by one of several alternatives, not all which require the proof of a completed theft, as provided by Article 29.01(1) V.T.C.A. The offense charged here (R-1) did rest on proof of a completed theft. A variance exists and a reversal might be mandated under the recent holdings of the Texas Court of Criminal Appeals. This Honorable Supreme Court should reverse this case because of the applicable statute the government was seeking to enforce was Sec. 29.03 of the Texas Penal Code.

Prejudice to the Petitioner was shown because of the lack of evidence that misled the jury to the detriment of the Petitioner.

It should be noted that the Court's charge was objected to

by Petitioner's attorney on page 170 of the Transcript.

In *Dowden v. State*, 537 S.W.2d 5, 1976, the Court said: "It is fundamental that a conviction for an offense cannot stand unless the charge authorized the jury to find a defendant guilty only for conduct constituting that offense, the indictment alleged such conduct, and the evidence at trial showed such conduct." These are the requirements of due proces of law. If the Trial Judge fails to apply the law to the facts raised by the evidence, it is not sufficient for the jury to receive abstract instruction on the law and then render a verdict according to a general conclusion on whether the law has been violated. *Williams v. State*, 547 S.W.2d 18, (1976). The State must prove its case beyond a reasonable doubt and must prove each element of the offense charged. It is the function of the charge to lead and to prevent confusion.

In the case at bar the petitioner, August Butler, has not had a fair an impartial trial. Proof that the charge was unfair can be seen in the "Notes from the Jury filed December 8, 1978, (R-26)." "The Jury would like to question whether or not the accused has to be in actual possession of the pistol to be guilty as charged, or can the mere presence of the gun be enough to find the accused guilty as charged."

In the *Williams Case*, above, the Court concluded that "Because a charge should affirmatively lead and dispel confusion, and because a charge does not apply the law to the facts fails to give such guidance, error of this character should remain the subject of a per se rule. Furthermore, the per se rule is not only fully justified, but also has its ease of understandability and application to command itself for a permanent place in our jurisprudence.

In *Bradley v. State*, 560 S.W.2d 650, 1978, the Court found that the charge is fundamentally defective because it allowed the jury to convict Appellant without finding all of

the statutory elements of the offense.

It has always been necessary to charge on all of the essential elements of an offense.

In *United States v. Busch*, 505 F.2d 78, U.S.Ct. of App., 5th Cir., 1974, Justice Clark in the opinion held that in failing to instruct on the elements of the offense charged . . . the District Court committed plain error affecting defendant's substantial rights, notwithstanding defense counsel's participation and acquiescence in each of the actions challenged. The three overriding principles in this area of law are:

A. "The Court should define the crime charged and specify its essential elements. A mere reference to the indictment is insufficient.

B. A Court should never direct a verdict of guilt, in whole or in part.

C. Special interrogatories should not be used in criminal trials."

In *United States v. Green*, 494 F.2d 820, 1974, U.S. Ct. of App., 5th Cir., Justice Ainsworth considered an issue of whether the instructions to the jury were sufficient to ensure a fair trail to Appellant Green. Viewing the jury charge as a whole, it was full, adequate and without plain error. A "presumption instruction" is disapproved and their use is reversible error when they tend to reverse the burden of proof in the jury's mind.

In *Davis v. State*, 557 S.W.2d 303, 1977, the Texas Court of Criminal Appeals held that a charge to the jury was fundamentally erroneous as authorizing conviction under every conceivable theory under the statute rather than limiting convictions to the theory alleged in the indictment. This is fundamental error and calls for a reversal. This was also an aggravated robbery case. This is proof that the charge was erroneous.

In *Robinson v. State*, 553 S.W.2d 371, 1977, the Texas Court of Criminal Appeals held that a charge authorizing a conviction under every conceivable theory under the robbery and aggravated robbery statutes, rather than limiting it to the theory alleged in the indictment was fundamental error.

Petitioner therefore respectfully submits that the improper instructions to the jury constitute reversible error.

Tenth Question Presented: Whether or not the F.B.I. fingerprint report that was favorable to the defendant was properly excluded from evidence?

Argument and Authorities

Hon. J. Bonner Dorsey, trial attorney for August Butler, attempted to have admitted latent fingerprints that were taken from the bottle and from the six pack of beer that the two bandits handled. (T-116). These prints were sent to the F.B.I. lab in Washington by Ruben V. Martinez, along with known prints of August Butler. The report states that: "Two latent fingerprints are not identical with the fingerprints of Butler." (T-117). The Honorable Owen D. Cox, District Judge for the Southern District of Texas, refused to admit the report or the prints into evidence. (T-118). Defense attorney excepted to the Court's ruling. (T-118).

In *Jackson v. State*, 551 S.W.2d 351, 1977, the Texas Court of Criminal Appeals reversed a conviction for robbery by firearms, and identification was a crucial issue at the trial.

Petitioner therefore respectfully submits that the failing to admit fingerprint report into evidence constitutes reversible error.

Conclusion

Petitioner respectfully submits that with respect to due process and fundamental fairness, the Defendant, August Butler, did not receive a "fair trial" because:

1. It was improper for the District Judge to alter the indictment;
2. The identification witnesses were not reliable;
3. The government failed to prove jurisdiction;
4. The government failed to prove beyond a reasonable doubt that a pistol was used in the alleged robbery;
5. The indictment failed to allege ownership;
6. The indictment failed to allege that the money was "United States Currency";
7. The indictment failed to allege that the taking was without the owner's consent.
8. The trial court should have charged the jury on circumstantial evidence;
9. The charge given to the jury was improper; and
10. The F.B.I. fingerprint report that was favorable to the defendant was improperly excluded from evidence.

Petitioner respectfully and sincerely believes that a substantial question is presented to this Honorable Supreme Court here.

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that this Honorable Supreme Court grant a writ of certiorari and upon review of this case, will reverse and remand for further proceedings, or dismissal of the indictment and discharge the petitioner.

Respectfully submitted,

/s/ Charles L. Franz, Jr.

CHARLES L. FRANZ, JR.
1019 Camden St.
San Antonio, Texas 78215
Attorney for Petitioner

Certificate of Service

I, Charles L. Franz, Jr. hereby certify that on this 25th day of February, 1980, I have mailed, postage prepaid 40 printed copies of the above and foregoing Petition for a Writ of Certiorari to the Clerk, United States Supreme Court, Washington, D.C. and 3 copies to the Solicitor General, Room 5614, Department of Justice, Washinton, D.C. 20530.

/s/ Charles L. Franz, Jr.

Charles L. Franz, Jr.

ANNEX A: INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATE OF AMERICA	*	
vs.	*	**CRIMINAL NO.**
AUGUST BUTLER	*	**C-78-183**

INDICTMENT

THE GRAND JURY CHARGES:

That on or about August 5, 1978, at the Naval Air Station in the Corpus Christi Division of the Southern District of Texas, on land acquired for the use of the United States and under the exclusive jurisdiction thereof, AUGUST BUTLER, did then and there while in the course of committing theft of Nine Hundred Dollars and No Cents ($900.00) in money from Lorraine A. Boyd, with intent to obtain and maintain control of the money using and exhibiting a deadly weapon, namely a pistol, knowingly and intentionally threaten and place Loraine A. Boyd in fear of

imminent bodily injury and death. (Violation: Title 18, United States Code, Section 3 and Section 29.03 of the Texas Penal Code)

A TRUE BILL:

/s/

FOREMAN OF THE GRAND JURY

J.A. "TONY" CANALES
United States Attorney

By: /s/ Robert A. Berg

ROBERT A. BERG, Assistant
United States Attorney

ANNEX B

United States of America vs.

DEFENDANT: AUGUST BUTLER

United States District Court
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C-78-183

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (6/74)

COUNSEL

In the presence of the attorney for the government, the defendant appeared in person on this date: 1 5 79

[ ] WITHOUT COUNSEL

[X] WITH COUNSEL — J. Bonner Dorsey (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea

[ ] NOLO CONTENDERE [X] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of

[ ] NOT GUILTY. Defendant is discharged

[X] GUILTY

Defendant has been convicted as charged of the offense(s) of threatening with deadly weapon while committing theft in violation of Title 18, United States Code, Section 13, and Section 2903 of the Texas Penal Code, as charged in the Indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

TWELVE (12) YEARS.

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JAN 9 1979
V. BAILEY THOMAS, CLERK
BY DEPUTY: Sue M Dall

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The defendant shall comply with all conditions of probation during the period of probation for a minimum of two years pursuant to

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends

APPROVED AS TO FORM:

ROBERT A. BERG, AUSA

RETURN

I certify that I executed this judgment as follows:

Owen D. Cox

OWEN D. COX

33 Date 1-09-79

ANNEX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-5052
Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AUGUST BUTLER,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

---

(DECEMBER 14, 1979)

Before GOLDBERG, RONEY and TJOFLAT, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

---

*Fed. R. App. P, 34(a); 5th Cir. R. 18.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

ANNEX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-5052

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AUGUST BUTLER,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING

(January 30, 1980)

Before GOLDBERG, RONEY and TJOFLAT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

Form 703-2

Supreme Court, U. S.
FILED
JUN 12 1980
MICHAEL RODAK, JR., CLERK

No. 79-1534

In the Supreme Court of the United States

OCTOBER TERM, 1979

AUGUST BUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

DAVID B. SMITH
Attorney
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1534

AUGUST BUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 34) is noted at 608 F. 2d 1372 (table).

JURISDICTION

The judgment of the court of appeals was entered on December 14, 1979. A petition for rehearing was denied on January 30, 1980 (Pet. App. 35-36). The petition for a writ of certiorari was filed on March 19, 1980, and is thus out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence at trial, including identification evidence, was sufficient to support petitioner's conviction.

2. Whether the district court erred in failing to admit an FBI fingerprint report into evidence.

3. Whether the court erred in correcting a typographical error in the indictment.

4. Whether the indictment was defective in failing to specify the owner of the stolen money, that it was taken without the owner's consent, and that it was "United States currency."

5. Whether the court erred in taking judicial notice of the fact that the Corpus Christi Naval Air Station is a federal enclave.

6. Whether the government was required to prove that the weapon used in the robbery was a pistol because the indictment referred to use of a pistol.

7. Whether the court erred in failing to give a specific charge on circumstantial evidence.

8. Whether the court's charge to the jury in accordance with the language of the statute improperly varied from the indictment.

STATUTORY PROVISIONS INVOLVED

Section 29.02 of the Texas Penal Code Ann. (Vernon 1974) provides in pertinent part:

> *Robbery*
>
> (a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 of this code and with intent to obtain or maintain control of the property, he:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Section 29.03 of the Texas Penal Code Ann. (Vernon 1974) provides in pertinent part:

Aggravated Robbery

(a) A person commits an offense if he commits robbery as defined in Section 29.02 of this code, and he:

(1) causes serious bodily injury to another; or

(2) uses or exhibits a deadly weapon.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of aggravated robbery, in violation of 18 U.S.C. 13 (the Assimilative Crimes Act) and Section 29.03 of the Texas Penal Code. He was sentenced to 12 years' imprisonment (Pet. App. 33). The court of appeals summarily affirmed (Pet. App. 34).

The evidence at trial showed that, on August 5, 1978, petitioner and another black male robbed at gunpoint a liquor store at the Corpus Christi Naval Air Station. After tying up Lorraine Boyd, the supervisor at the store, they absconded with $900. Two minutes later, a customer freed Ms. Boyd and telephoned the base security officers (Tr. 8-17, 33). Ruben Cuevas, a guard stationed at the installation's front gate, heard on his radio that a robbery had taken place. He was told to be on the lookout for two black males in a blue car. Shortly thereafter, Cuevas saw a blue car being driven over the shoulder of the road to get around other cars stopped at the gate. He ordered the

black male driver to stop, but the car hurtled at him and sped away. Cuevas saw a second black male hiding between the dashboard and the front seat as the car passed him. Cuevas wrote down the number of the vehicle's license plate, NJP-825 (Tr. 37-39).

Shortly after the robbery, E.C. Miller, who lived near the Air Station, observed a blue Buick park in his neighbor McDaniel's driveway. Two black men got out of the car and walked away in the direction from which the car had come. The car was still in the driveway the next morning when the police arranged to have it towed away at McDaniel's request and impounded it (Tr. 52-53, 56-58). The license number of the car matched that of the car Cuevas had seen driving away from the Air Station, and petitioner later admitted to an investigator that the car belonged to him (Tr. 65-69). Indeed, petitioner came to claim the car about a week after it had been impounded. The car was never reported stolen (Tr. 146-147, 153-154). A search of the car pursuant to a warrant revealed $165 stuffed underneath the driver's seat and various documents, including petitioner's driver's license and military dependent identification card (Tr. 73-74).

Both Lorraine Boyd and Ruben Cuevas identified petitioner in court as one of the robbers (Tr. 18-19, 39). Boyd had previously picked petitioner's photograph out of a seven photo array shown to her by the FBI approximately ten days after the robbery (Tr. 23-28, 78).[1]

---

[1]There is conflicting evidence in the record regarding the degree of certainty with which Boyd picked out petitioner's photo. When Boyd attempted to identify the second robber, she selected the picture of a man not involved in the robbery. She testified that she had told the agent that her degree of certainty with regard to the identification of petitioner's photograph had been "five" and that her degree of certainty regarding the other identification was "nine," but also said

ARGUMENT

1. Petitioner generally asserts (Pet. 9) that he is innocent, but the evidence summarized above is clearly sufficient to support his conviction.[2] Specifically, he contends (Pet. 14-17) that the identification evidence introduced by the government was insufficient to prove his guilt, stating (Pet. 14) that there was no positive identification of him by either Boyd or Cuevas. The facts belie petitioner's contention, for both witnesses identified him in court, and Boyd also selected his photograph in a pretrial photo array identification procedure. Petitioner does not claim that the photo identification procedure was improper in any way, and there is no evidence in the record of any defect in the photo array procedure employed by the FBI. Thus, petitioner's discussion (Pet. 15-17) of cases dealing with impermissibly suggestive pretrial identification procedures is irrelevant.

Petitioner also contends that his innocence is established by the fact that both Boyd and Cuevas testified that he was clean shaven on the day of the robbery, whereas he "was never clean shaven in the last five years" (Pet. 9). But there is no evidence in the record that petitioner had a beard or moustache at any time other than the day of the trial. Similarly, petitioner now seeks to rebut other evidence against him by claiming that "his car was stolen"

---

that she may have gotten the "five" and "nine" mixed up (Tr. 23-28). The FBI agent who showed her the photo array testified that Boyd had characterized her identification of petitioner's photograph as a "nine" and the misidentification of the other man as a "five" (Tr. 78-80).

[2]Petitioner did not take the stand. The only evidence he put forward in his defense related to fingerprint identifications. As is discussed in point 2, *infra*, that evidence was not exculpatory.

(Pet. 9). Again, there is no evidence in the record to that effect, and the record does show that petitioner did not report his car as stolen.[3]

2. Petitioner also contends (Pet. 28) that the trial court improperly excluded an FBI fingerprint report that tended to exculpate him. This contention is without merit.

Lorraine Boyd, the robbery victim, testified that petitioner picked up a bottle of brandy in the store and that the other robber handled a six-pack of beer (Tr. 18-19, 22). Latent fingerprints were taken from the brandy bottle and the six-pack and sent to the FBI for analysis. Working with an incomplete set of petitioner's known fingerprints, the FBI reported that two fingerprints, apparently taken from the six-pack of beer, did not match petitioner's known prints. The report also said that other latent prints could not conclusively be compared with the incomplete set of petitioner's known prints (Tr. 97-99, 112, 117, 127). The report was properly excluded because it did not tend to exculpate petitioner and might have confused the jury. See Fed. R. Evid. 403. Since there was no claim by the government that petitioner had touched

---

[3]Petitioner states (Pet. 17) that the Corpus Christi police have pictures of him, not introduced at trial, that prove he was not clean shaven on the day of the robbery. Petitioner also states (Pet. 23-24) that his co-workers "know that he was not clean shaven" on the day of the robbery, and that he has proof, in the form of a long distance telephone bill, that he reported his car stolen. This evidence is not in the record, and petitioner has not raised these claims before. If petitioner is aware of newly discovered exculpatory evidence, the proper place to seek relief is in the district court.

the six-pack of beer, the fact that the latent fingerprints on it did not match his known prints obviously had no tendency to establish his innocence.[4]

3. Petitioner's remaining claims are insubstantial on their face and do not require a detailed response here.

a. Petitioner asserts (Pet. 10-14) that the trial court erred in granting the government's motion to correct a typographical error in the indictment. The Assimilative Crimes Act was incorrectly cited as 18 U.S.C. 3 instead of 18 U.S.C. 13. Petitioner makes no claim that he was misled by what defense counsel at trial characterized as "a clerical error" (Tr. 170). He was properly advised as to the nature of the charges against him. Rule 7(c)(3) of the Federal Rules of Criminal Procedure specifically provides that an error in the citation of a statute "shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

b. Petitioner also contends (Pet. 20-22) that the indictment was defective in failing to allege specifically who owned the $900 that was stolen, that the money was United States currency, and that it was taken without the

---

[4]In any event, petitioner was permitted to introduce virtually the same evidence in another form. The prosecutor agreed that he would not object to the introduction of expert fingerprint testimony if petitioner submitted to a complete fingerprinting that might allow a more informed judgment concerning the other latent prints. Petitioner did submit to such fingerprinting, and he was then allowed to call Sergeant Wilson of the Corpus Christi Police Department to make an expert comparison. Wilson's testimony, based on a complete set of known fingerprints, was consistent with the conclusions of the FBI report. He testified that the latent prints found on the beer cans did not match petitioner's fingerprints, but the prints found on the brandy bottle were too poor to permit comparison (Tr. 97-99, 118, 123-126, 139-142).

owner's consent. These omissions do not constitute defects in the indictment. The indictment (Pet. App. 31-32) plainly contained the elements of the offense charged and informed petitioner of the charges against him as required by law. See, *e.g.*, *Hamling* v. *United States*, 418 U.S. 87, 117 (1974).

c. Petitioner's contention (Pet. 17-18) that the district court erred in taking judicial notice of the fact that the Corpus Christi Naval Air Station is a federal enclave for purposes of 18 U.S.C. 13 is frivolous. See, *e.g.*, *United States* v. *Hughes*, 542 F. 2d 246, 248 n.1 (5th Cir. 1976).

d. Petitioner also contends (Pet. 18-20) that because the indictment alleged that the deadly weapon used was a pistol and the government did not prove that the gun used in the robbery was in fact a pistol, his conviction should be reversed. Because the statute requires use or exhibition of a deadly weapon, not necessarily a pistol, petitioner's contention is without foundation. In any event, the evidence at trial was sufficient to support a finding that the weapon was a handgun. It is most unlikely that the robbers could have hidden a shotgun on their persons while they were in the store and still have been able to pretend to be normal customers.

e. Petitioner's contention (Pet. 22-23) that he was entitled to an instruction on circumstantial evidence is also without merit. Contrary to his assertion (*ibid.*), there was indeed direct evidence that he was one of the robbers, Lorraine Boyd's testimony. In any event, this Court has stated that "where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect." *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954). See also *United States* v. *Clements*, 588 F. 2d 1030, 1040 (5th Cir.), cert. denied, 440 U.S. 982, 441 U.S. 936 (1979).

f. Petitioner also contends (Pet. 24-28) that because the charge in the indictment was phrased in the conjunctive, it was reversible error for the district court to instruct the jury in the disjunctive.[5] This contention is without merit. Where an offense is worded disjunctively in the statute, as it is in Section 29.03 of the Texas Penal Code, there is no error in charging the jury in the disjunctive even if the indictment is phrased in the conjunctive. See, *e.g.*, *United States* v. *Duran*, 411 F. 2d 275, 278 (5th Cir. 1969); *Rimerman* v. *United States*, 374 F. 2d 251, 253-254 (8th Cir.), cert. denied, 387 U.S. 931 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

DAVID B. SMITH
Attorney

JUNE 1980

---

[5]For example, the indictment reads "knowingly *and* intentionally threaten," while the court's instruction reads "intentionally *or* knowingly threaten." See Pet. 24.

DOJ-1980-06